Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERITECH CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-17
	)	
MCI TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant.	)	

OPPOSITION TO MOTION TO COMPEL

Defendant MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby opposes the Ameritech Motion to Compel MCI to answer certain of Ameritech's First Set of Interrogatories. Ameritech's Motion confirms that it seeks to have the Commission apply the joint marketing restriction in Section 271(e)(1) of the Communications Act in a manner that is contrary to the intent and language of that provision and to the Commission's interpretation of that provision in the Non-Accounting Safeguards Order[1] and that would chill the exercise of the First Amendment values recognized in that order.[2] Ameritech also reaffirms its desire for the minute details of MCI's marketing plans throughout Ameritech territory, going so far as

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[1] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. December 24, 1996) (Non-Accounting Safeguards Order), petitions for recon. pending.

[2] Id. at ¶¶ 279-80.

to request the identification of draft advertisements and the content of conversations with individual potential customers. Even more remarkably, Ameritech insists that there be no time limit on its open-ended demands for such details, irrespective of the time-limited nature of the advertising campaign that is the ostensible target of Ameritech's complaint.

Introduction

Ameritech's insistence on disclosure of such a vast storehouse of information unrelated to the legality of the advertisement attached to its Amended Complaint is especially surprising in light of its apparent lack of attention to the answers that MCI did provide to the few relevant questions posed in Ameritech's First Set of Interrogatories. MCI's answer to Interrogatory 2, in particular, undermines Ameritech's rationale for all of the discovery to which MCI objected. In order to understand why, it is first necessary to review Ameritech's theory of its case, on which it bases its Motion to Compel.

Ameritech claims that the challenged joint marketing advertisement published in newspapers in three cities in its service territory -- Chicago, Detroit and Cleveland -- was misleading because it did not clearly indicate that the package of local and interLATA services offered in the ad was only available to customers to whom MCI is able to provide facilities-based local services. Ameritech argues that customers to whom MCI can provide local service only by reselling Ameritech's local

services thus might have been led to believe by the ad that the offer was available to them. Due to this alleged ambiguity as to the target of the ad, according to Ameritech, the ad violates Section 271(e)(1) of the Act, which prohibits MCI from jointly marketing interLATA and resold local services. Ameritech argues that such ambiguity justifies the discovery of information revealing MCI's intent and actual customer response to the ad to determine whether the ad was deceptive in intent and effect and to show whether MCI intended to use the ad to intentionally market interLATA and resold local services jointly.[3]

In order to make this case most effectively, however, Ameritech apparently finds it necessary to studiously avoid any acknowledgment of MCI's response to Interrogatory 2. Pursuant to Ameritech's instructions, MCI answered the relevant interrogatories, including Interrogatory 2, not only as to the advertisement that was attached to the Amended Complaint but also as to "all versions of the ... advertisement, including those that are substantially similar to the [attached] advertisement."[4] MCI accordingly provided information about the publication of both the challenged ad and a similar ad, including the publication of those ads with a disclaimer on the last two of the four days on which the ads appeared in each newspaper (except for the Chicago Tribune, in which the disclaimer appeared on the last three of the five days on which the ads appeared). That

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[3] See, e.g., Ameritech Motion to Compel at 9-10.

[4] Ameritech's First Set of Interrogatories at 3.

disclaimer stated:

> Offer only for large businesses with local service over MCI-owned facilities. Not available in all areas. Call for availability.

Ameritech has already conceded in this case that such a disclaimer "textually ... satisfies the requirements of the Act and Commission rules"[5] and that a joint marketing ad of the type challenged in this case "compl[ies]" with Ameritech's interpretation of Section 271(e)(1) and Commission rules if it contains such a disclaimer.[6] Thus, the ads with the disclaimer, under Ameritech's interpretation, were not misleading or ambiguous. Since Ameritech's rationale for its discovery requests is that the original ad was misleading or at least ambiguous, there is, therefore, no justification for Ameritech's demand for information about the customer response to the ads or MCI's intent in publishing the ads. Since the disclaimer appeared in the latter half of the ad campaign, Ameritech's demand for information as to the customer response to the ads and MCI's communications with its potential customers long after the end of the campaign is especially unjustifiable and abusive. If such discovery requests were proper, discovery as to any non-misleading, legal joint marketing advertisement could always be demanded under Ameritech's approach.

Ameritech's Motion also reflects some confusion as to the

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[5] Ameritech Motion for Summary Judgment and Opposition to MCI Motion for Summary Judgment at 8 n.9 (June 23, 1997).

[6] Id. at 7-8.

Commission's discovery procedures in formal complaint cases. Ameritech notes that, in response to MCI's request to defer discovery pending resolution of the parties' motions for summary judgment, it offered a "compromise" under which any objections to its discovery would have to be stated on the original due date while "substantive discovery would be temporarily deferred."[7] This was not a compromise at all, of course, since Ameritech knew full well that almost all of its discovery was objectionable under MCI's view of the relevant law and regulations.

Under Section 1.729(b) of the Commission's Rules, parties must respond to interrogatories within 30 days. Section 1.729(b) specifies that in its response, a party must fully answer each interrogatory not "objected to" and that the reason for any objection "shall be stated in lieu of an answer." Accordingly, for the vast majority of Ameritech's interrogatories, its "compromise" was simply a restatement of what the rules ordinarily require. The denial of MCI's motion to defer discovery thus did not mean that MCI was precluded from stating its objections on the due date, as Ameritech now argues on page 4 of its Motion to Compel. Rather, it simply left MCI subject to Section 1.729(b) of the Rules, which require it to either answer or object to each interrogatory, which it did.

Ameritech also criticizes MCI's claim of confidentiality as to much of the requested information because it pertains to "an

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[7] Ameritech Motion to Compel at 4.

ad campaign that was completed some months ago."[8] The fact that this particular ad campaign is over, however, hardly lessens the proprietary nature of the marketing strategy and customer response data that Ameritech seeks. The planning that goes into one ad or set of ads may well be reflected in future ads, and MCI's contacts with customers or potential customers a few months ago are obviously still proprietary, just as Ameritech claims that its interactions with its customers remain proprietary. In any event, Ameritech demands information about customer responses long after the close of the campaign and into the future. All of this information is obviously extremely commercially sensitive and would be especially valuable to Ameritech in its ongoing efforts to stifle incipient local service competition, a goal which is certainly consistent with the filing of this complaint proceeding and Ameritech's discovery demands. Its objections to MCI's claims of confidentiality thus are entirely frivolous and should be rejected.

All of the Discovery Demanded by Ameritech is Irrelevant and Contrary to the First Amendment Rights Recognized in the Non-Accounting Safeguards Order

Turning to the relevance of the individual interrogatories, Ameritech's discovery requests should also be rejected for the reasons stated below. MCI will discuss its confidentiality claims separately.

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[8] Id. at 5.

Interrogatory 2

Ameritech launches into a tirade as to MCI's failure to respond completely to Interrogatory 2, which requests details as to the publication of the ad in question. It insists that MCI reveal, for each of the newspapers in which the ad was published, and for each day, each geographic issue in which the ad appeared. Apparently, Ameritech is unfamiliar with the nomenclature ordinarily used to discuss such matters. MCI stated that the ad appeared in the "full run" on each of the days indicated. That means it appeared in every geographic edition of each newspaper on those days. The question has been answered.

Interrogatories 3 and 4

Interrogatories 3 and 4 request the identification of documents relating to the purposes of the ads, the customers targeted by the ads and the wording of the ads. MCI objected to those interrogatories on the grounds that, as the Commission held in the Non-Accounting Safeguards Order, there is, under the First Amendment, "no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service."[9] As MCI has explained, since it provides local service to larger businesses through its own facilities, its joint marketing of local and interLATA services in an ad explicitly addressed to

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[9] Non-Accounting Safeguards Order at ¶ 279.

"larger businesses" cannot be lawfully restricted. Ameritech hangs its hat on the next paragraph in the Non-Accounting Safeguards Order, which held that in situations where a covered IXC provides local service on a resale basis, it may not offer both local and interLATA services in a package or suggest both are available through a single transaction.[10]

Which rule applies thus depends on the type of local service available to customers addressed in the text of the ad, which can be ascertained from the text of the advertisement, where and when it is published and the manner in which MCI provides and is able to provide local service to the type of customers addressed in the text of the advertisement. Nothing else is relevant. Documents reflecting possible purposes of the advertisement or customers intended to be targeted are irrelevant, since who is targeted by the advertisement is evident from the text of the advertisement and where it is published.

Ameritech argues in its Motion to Compel that the requested documents would shed light on MCI's intent in running the ads. Nowhere, however, does Ameritech address the Commission's holding, quoted above, that there is "no lawful basis for" prohibiting IXC joint marketing "if [the IXC] provides local service through means other than reselling BOC local exchange service."[11] The Commission did not make an exception for situations in which a competitor wishes to psychoanalyze an IXC

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[10] Id. at ¶ 280.

[11] Id. at ¶ 279.

running such a legitimate joint marketing ad. Ameritech's requested examination of the inner workings of MCI's marketing campaign is especially irrelevant in light of MCI's answer to Interrogatory No. 2, discussing the disclaimer that Ameritech admits complies with Section 271(e)(1). Ameritech has not addressed how such an examination could possibly be proper for an ad that Ameritech effectively admits was not misleading in the latter half of the campaign. If such an inquiry were proper for an ad that "textually" "satisfies the requirements of the Act and Commission rules,"[12] competitors would effectively be given roving commissions to examine the thinking behind unquestionably legal advertisements at any time. Such an Orwellian thought control mandate would not only be inconsistent with Section 271(e)(1), but would also violate the First Amendment right to make "truthful statements about lawful activities" recognized in the Non-Accounting Safeguards Order.[13]

Interrogatory 5

Ameritech also seeks the identification of documents relating to the nature of customer responses to the ads, including the types of customers who responded. MCI objected to this question on the same grounds as Interrogatory No. 3. Information about customer response to an ad is irrelevant to whether the ad was legal when published. Moreover, assessing the

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[12] Ameritech Summary Judgment Motion at 8 n.9.

[13] Non-Accounting Safeguards Order at ¶ 279.

legality of an ad by the customer response that happens to be generated thereby would chill the exercise of the First Amendment rights recognized in the Non-Accounting Safeguards Order, as discussed above.

Ameritech argues in its Motion to Compel that information as to "how customers interpreted the ads" would show whether the ads were misleading.[14] That argument simply highlights how improper this interrogatory is. No matter how clear a disclaimer was provided in an ad, the same rationale could be used to justify the actual effect on consumers. Presumably, if even one consumer were the slightest unsure as to whether he or she could take advantage of the offer in an ad, no matter how clear the ad was, Ameritech would argue that such a response would be relevant to the legality of the ad. Such an approach would allow discovery as to the details of the customer response to any non-misleading, legal joint marketing advertisement, which would be contrary to the findings and First Amendment discussion in the Non-Accounting Safeguards Order, as explained above.

In the context of the facts of this case, Ameritech's request here is not much different from the extreme hypothetical situation depicted in the preceding paragraph. In the latter half of the ad campaign challenged in this case, MCI included a disclaimer in the ads that Ameritech concedes makes such an ad unambiguously legal. Given the admittedly legal nature of those ads, there can be no justification for any inquiry into the

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[14] Ameritech Motion to Compel at 9.

customer response to them.

Even during the first half of the ad campaign, prior to the appearance of the disclaimer, Ameritech's rationale is weak, even on its own terms. Ameritech argues that MCI's targeting of "larger businesses" in the ads was much less clear and more ambiguous than a disclaimer stating that the offer was only valid for customers to whom MCI could provide facilities-based local services.[15] On the contrary, most customers would have a clearer idea of what is meant by a larger business than whether they might be served via MCI's own facilities.

If customer confusion as to the availability of the offer in the ad is the touchstone for the relevance of customer responses to the ad under Ameritech's approach, such discovery would always be appropriate in a case where there was a clear disclaimer, since most customers -- even sophisticated large business customers -- would not be certain as to whether they could, in fact, be served via an IXC's own facilities and would find it necessary to inquire further. Many of those who inquired would not be eligible for the offer. Clearly, however, even under Ameritech's theory, discovery as to such customer inquiries and the carrier's response thereto would be improper where there had been a clear disclaimer of the type endorsed by Ameritech. Thus, such inquiries by potential customers — even those who turn out not to be eligible for the offer in the joint marketing ad -- shed no light on the clarity or legality of the ad. Ameritech

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[15] Ameritech Motion to Compel at 8.

accordingly has not explained why discovery would be proper here, where customers were put on notice that the target market consisted of "larger businesses," a criterion that could be expected to generate less customer confusion and questions than the more technical disclaimer that Ameritech admits is not misleading.

Interrogatories 6-9

These interrogatories request information as to when MCI began reselling local services in Detroit and Cleveland or when it plans to do so. MCI objected to those interrogatories to the extent they seek information as to any customers other than the larger businesses addressed in the ads. MCI also objected to Interrogatories 8 and 9 on the ground that MCI's plans to resell local service in the future are entirely irrelevant to the legality of an ad campaign that ended in May. MCI answered Interrogatories 6-8 as to larger business customers, stating that it has not and does not resell Ameritech local services in the Detroit and Cleveland areas but plans to do so in Michigan in late fall of 1997.

Ameritech argues in its Motion to Compel that since it disputes MCI's claim that the ads were clearly limited to larger businesses, any current or future resale of local services by MCI in the areas where the ads appeared is relevant, since Ameritech "believes that it was MCI's intention to use the lure of bundled packages and one-stop shopping to generate inbound calls,

including calls from customers to whom MCI is, or will soon be, reselling Ameritech services in areas where the ad was circulated...."[16] Ameritech's beliefs, however, cannot make its discovery requests relevant. As the Commission held in the Non-Accounting Safeguards Order, there is "no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service."[17] Since MCI was providing local services to larger business customers in the Ameritech region only through its own facilities, its joint marketing ads were legal.

Ameritech contends that it was not clear that the ads were limited to larger businesses. That is just the point: if the ads were misleading, they were misleading irrespective of whether MCI is or will be providing resold local service to customers other than larger businesses. The Commission's finding in the Non-Accounting Safeguards Order that an IXC joint marketing ad is legal if the IXC provides local service by means other than resale does not make an exception for a situation where the IXC at some time in the future does resell local service. Such future resale of local services cannot make an otherwise legal ad illegal. Finally, Ameritech's rationale is once again undercut entirely by the disclaimer that appeared in the latter half of the ad campaign. Even under Ameritech's interpretation, those

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[16] Ameritech Motion to Compel at 10.

[17] Non-Accounting Safeguards Order at ¶ 279.

ads were not ambiguous as to which customers were their targets. There is therefore no justification for requests for information as to MCI's resale of local services during and after the publication of the ads with the disclaimer.

Interrogatories 10-13

Interrogatories 10 and 12 request details as to MCI's communications with customers who responded to the ads and to whom MCI was not yet able to provide local services through its own facilities, as well as instructions given to sales representatives as to how to respond to such customers. Interrogatory 11 requests data as to the volume of such responses by customers to whom MCI could not yet provide local services through its own facilities. Interrogatory 13 asks about MCI's current policies as to how it responds to calls from larger business customers that are located in an area of Chicago, Cleveland and Detroit or their surrounding suburbs where MCI cannot yet provide local service through its own facilities.

MCI objected to these interrogatories on similar grounds to its objections to Interrogatories 3 and 5, arguing that the ads cannot be made legal or illegal by the nature and volume of customer responses to the ads, MCI's communications with those customers, and instructions and MCI's policies as to such communications. If an otherwise legal ad could become illegal on account of subsequent statements by the carrier placing the ad that are themselves legal, the carrier running the ad would be

foreclosed from making otherwise legal statements in the future, thus chilling the exercise of the First Amendment rights recognized in the Non-Accounting Safeguards Order.[18]

Ameritech argues in its Motion to Compel that such information could reveal whether MCI anticipated calls from larger businesses and others to whom MCI could not yet provide facilities-based services, whether MCI sought to use such calls for marketing purposes and whether Ameritech was damaged thereby.[19] None of those interrogatories, however, appears to relate to what MCI might have anticipated when it published the ads. More importantly, what MCI might have anticipated when the ads were published, as explained previously, is not a proper subject of discovery in light of the First Amendment rights recognized in the order. Section 271(e)(1) does not confer on Ameritech the status of roving thought police. Rather, it prohibits joint marketing of resold local service and interLATA service by certain IXCs.

Interrogatories 10-13 would certainly yield information as to MCI's marketing to those customers, but, as also explained previously, MCI's subsequent marketing to customers responding to the ads cannot affect their legality. Ameritech seems especially upset over this issue, characterizing as "unintelligible ... gibberish" MCI's point that under Ameritech's approach, an

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[18] The Commission cannot prohibit "truthful statements about lawful activities." Non-Accounting Safeguards Order at ¶ 279.

[19] Ameritech Motion to Compel at 11.

otherwise legal ad could become illegal on account of subsequent carrier statements that are themselves legal, a state of affairs that cannot be squared with the First Amendment's requirement that there be no restrictions on "truthful statements about lawful activities."

Ameritech replies that it does not claim that an otherwise legal ad could become illegal by virtue of subsequent statements,[20] but that is clearly the effect of Ameritech's theory of the case underlying its discovery requests. The Commission held in the Non-Accounting Safeguards Order that there is "no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service."[21] Since MCI was providing local services to larger business customers in the Ameritech region only through its own facilities, its joint marketing ads were legal. Even under Ameritech's interpretation, at least the ads with the disclaimers were legal. Yet, under Ameritech's theory, otherwise legal marketing of local services to customers responding to those ads could render the ads illegal, an approach that is utterly inconsistent with the First Amendment. If that is not Ameritech's theory, then it has not explained the relevance of these interrogatories.

Ameritech continues its argument by stating that the ad was

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[20] Ameritech Motion to Compel at 11.

[21] Non-Accounting Safeguards Order at ¶ 279.

illegal because it was intentionally misleading when it was published, not that it could become illegal by virtue of subsequent statements. Whether or not the ad was misleading, however, can only be assessed by examining the ad itself, not the statements made to consumers long after the ad ran. Ameritech has also failed to explain how ads with a disclaimer it concedes complies with its view of Section 271(e)(1) could possibly be intentionally misleading. Since the clear legality of those ads undercuts Ameritech's stated rationale for Interrogatories 10-13, its motion should be denied as to those interrogatories.

Interrogatory 13 is especially improper, since it requests information concerning MCI's current policy as to whether it markets resold local services to larger business customers to whom it is not yet able to provide facilities-based local services. This interrogatory is not even framed in terms of the ad campaign that is the ostensible excuse for this litigation. Rather, Ameritech wants to know how MCI markets local services to certain larger business customers who happen to contact MCI for any reason. This stretches Ameritech's theory of the case even further, since it assumes that any larger businesses "who may have contacted MCI in the mistaken belief that MCI could offer them bundled service packages and the advantages of one stop shopping" at any time did so because of the ads, which stopped running three months ago.

Moreover, Ameritech is basing its rationale on customers' possible "mistaken belief[s]." As explained above, customers

will also be unsure as to whether they can take advantage of an offer that is only available where an IXC can provide facilities-based local service. Such confusion will exist even where the clearest possible disclaimer appears in a joint marketing ad, since most customers will not be sure as to whether an IXC can provide facilities-based local service to them. Since "mistaken beliefs" are possible even with the clearest disclaimers, due to the complex facts involved, such beliefs on the part of customers cannot justify discovery.

Interrogatories 14-16

These interrogatories request data as to the number of MCI local service customers that MCI can serve using its own facilities in the greater Chicago, Cleveland and Detroit areas. MCI partially objected on relevance grounds and objected on confidentiality grounds. Now that Ameritech has clarified those interrogatories, MCI objects to them insofar as they seek data as to customers other than larger business customers but would be willing to provide answers as to its larger business customers under a suitable protective agreement.

In its Motion to Compel, Ameritech relies on its previous arguments as to the relevance of information about customers other than larger businesses, namely, that the ads did not clearly limit the offer to larger businesses. As MCI has explained, that simply falls back on the text of the ad, which requires no discovery of subsequent events to determine.

Finally, once again, Ameritech has not dealt with the disclaimers that appeared in the latter half of the ad campaign. Those disclaimers rebut the argument that the ad was not clearly limited and thus eliminate Ameritech's stated rationale for these interrogatories.

Confidentiality Objections

Ameritech also requests the Commission to reject MCI's confidentiality objections to each of the interrogatories discussed above on the tenuous basis that the ad campaign involved in this case is over. As explained above, however, that argument makes no sense, since the requested discovery probes a wide variety of internal marketing strategy and policy making information, as well as customer data, that constitute classic examples of commercially sensitive proprietary information. The details of customer responses to MCI's marketing and its communications with potential customers are especially sensitive matters that would shed light on its ongoing marketing efforts.

It is especially ludicrous for Ameritech, which is trying every conceivable tactic to obstruct the development of local competition, to argue that the details of MCI's efforts to break into that closed market are not confidential. How this type of local service marketing and customer data could be anything other than commercially sensitive proprietary information -- particularly in a case brought by the local exchange monopoly serving the area for which the competitive local service

marketing and customer data is sought -- is impossible to imagine.

Ameritech's comments as to Interrogatories 14-16 are especially difficult to understand. It asserts, in response to MCI's claim of confidentiality, that it is not asking in those interrogatories for information about MCI's existing customers -- implicitly admitting that such information is confidential -- but, rather, about MCI's ability to provide local service to customers using its own facilities.[22] In fact, however, those interrogatories do ask about "the approximate number of existing customers that MCI can currently serve with its own local exchange facilities." (Emphasis in original). The number of "existing customers" can only refer to MCI's existing local service customers. Thus, those interrogatories seek commercially sensitive information as to MCI's customers, in the same manner as other interrogatories, and such information is similarly confidential.

Conclusion

For the reasons stated above, Ameritech's Motion to Compel MCI to answer the interrogatories discussed herein should be denied on the grounds that the information sought is irrelevant to any determination under Section 271(e)(1), such inquiry would chill the exercise of the First Amendment rights recognized in the Non-Accounting Safeguards Order, and the disclosure of such

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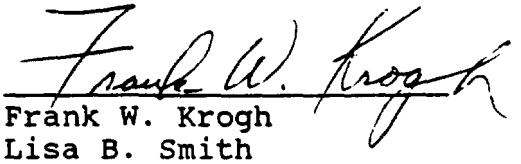
[22] Ameritech Motion to Compel at 17.

matters would reveal commercially sensitive proprietary information that must be accorded confidential treatment.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: 

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